

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Clinton Moore (Applicant)
AND Musashi Pty Ltd (Respondent)
REPRESENTATIVES Mr John Watson Applicant representative
Mr John Rooney Respondent representative
MEMBER OF AUTHORITY Y S Oldfield
PAPERS CONSIDERED 2 March 2001
DATE OF DETERMINATION 12 March 2001

DETERMINATION OF THE AUTHORITY

This matter concerns a problem which was lodged with the Authority on 19 December 2000. Nothing was heard from the respondents until 2 February 2001, when Mr Rooney contacted the Authority to advise that he had just received instructions from his client in Australia. A telephone conference was held to discuss the mediation of the problem as well as arrangements for an investigation should one prove necessary. However on 7 February Mr Rooney advised that having taken further instructions from his client, he wished to lodge a protest to jurisdiction. He said the employment contract between Mr Moore and Musashi Pty Ltd was expressed to be subject to the laws of Victoria Australia, and the respondent did not recognise the Authority's jurisdiction in respect of the problem.

I convened a further telephone conference. Mr Watson stated that the applicant believed that N.Z. law should apply to the contract and that the problem should be heard here. Mr Rooney said his client would not agree to attend mediation in the face of its protest to jurisdiction. I therefore advised that I would proceed to determine the preliminary jurisdictional issue. Since there did not appear to be a need for me to resolve any major factual differences in relation to the jurisdictional issue, I indicated that I would do so 'on the papers' and gave Mr Watson and Mr Rooney a timetable for presentation of affidavits and submissions.

I duly received affidavits from Mr Moore, Mr Eden Stephenson, and Mr Timothy Horewood, along with helpful submissions from Mr Watson and Mr Rooney.

The facts of the situation are as follows.

Mr Moore was employed by the respondent as a warehouse and office assistant from April 1999. He was interviewed by the former New Zealand Office Manager, Mr Eden Stevenson, who told him then that he was being employed by a local company whose parent company had its head office in Australia. In September 1999 he signed a written employment contract, confidentiality agreement

and non-disclosure agreement. Nothing between the parties changed in practice after these documents were signed.

Mr Moore disputes both the contention that he was employed by an Australian company and that the employment contract is to be governed by the laws of the state of Victoria, Australia. He believes that his problem should be dealt with in New Zealand, according to New Zealand law, because:

- He is a New Zealand citizen and resident;
- He performed his work in New Zealand at Auckland premises;
- He was recruited here;
- He understood his employer to be “Musashi New Zealand” because this was what was on his payslips and on the letterhead used here;
- His wages were paid from a New Zealand bank account into which monies were deposited from the New Zealand operations of the business.
- None of the Australian content of the written contract (such as Australian public holidays) was ever observed,
- He was told his sick leave entitlements were those applying under New Zealand law, not Australian;
- He did not receive the superannuation entitlements set out in the contract.
- Musashi Pty Ltd was registered in New Zealand, (registered office Union Street Auckland) although its directors lived in Australia.
- It was not practical for him to go to Australia to sort out his employment problem.

The issues

Counsel for the respondent, Mr Rooney, submits that there are three issues to be determined here:

1. What is the proper governing law of the contract?
2. Does the Authority have jurisdiction to hear the applicant’s claim?
3. Is the Authority *forum non conveniens*?

For the applicant, Mr Watson submits that a New Zealand company, not its Australian parent, was the employer. Mr Watson relies on this factor as being largely determinative of the matter.

I agree that the questions outlined by Mr Rooney are proper questions for my determination. With respect to Mr Watson, the matter will not be determined simply by settling the identity of the employer.

I have also given consideration to the effect of s. 238 of the Employment Relations Act 2000 and include below my conclusions on this issue.

1. The proper law

Mr Rooney correctly noted that the proper law of a contract is determined by:

1. The express intention of the parties
2. In the absence of an express provision, the intention to be inferred from the conduct of the parties

3. If intention cannot be inferred, the proper law is that with which the transaction had its closest and most real connection.

Mr Rooney has submitted that where the parties have expressly selected a system of law to govern the contract, that choice will be given effect provided that it is bona fide and legal, and there is no public policy reason for avoiding the choice. He argues that this is what has happened here.

He submits *“pursuant to the terms of the employment contract the parties have expressly selected the law of the State of Victoria as being the proper law of the contract. The contract uses Australian terminology throughout and there are several references to specific acts of Victoria. For example:*

- (a) clause 4 contemplates being employed in branch offices located within Australia and overseas;*
- (b) Clause 10 refers to “An Employment Separation Certificate”*
- (c) Clause 12 states that annual leave holidays are to be in accordance with the Employee Relations Act of Victoria;*
- (d) Clause 18 refers to “Federal or State award.”*
- (e) The non-disclosure agreement refers to Musashi Pty Limited being an Australian corporation and clause (d) states that:*

‘The agreement shall be governed by the laws of the State of Victoria.’

It is submitted that the following factors demonstrate that the law of the State of Victoria was chosen as the governing law:

- *the use of an Australian employment contract*
- *the terminology used in the contract is distinctly Australian*
- *the contract contains express reference to the laws of Victoria*
- *the choice of laws clause in the non-disclosure agreement attached to the contract.”*

Alternatively he submits that contracting parties may be found to have made a real choice of law, although not expressly stated in the contract, where such is expressed or demonstrated with reasonable certainty. Mr Rooney argues that this is the case here, and that even if there was not an express selection of Victorian law, an intention to make Victorian law the governing law of the contract can still be inferred from the terms of the employment contract and the surrounding circumstances. He referred the Authority to a list of factors to be considered in relation to drawing such an inference (see below.)

As a further alternative argument, Mr Rooney submits that

“If the Authority is not prepared to accept that the proper governing law is that of the State of Victoria either expressly or implicitly [sic], it is submitted that the employment contract had the closest and most real connection with the law of the State of Victoria, for the reasons set out above.

It is accepted that Mr Moore is resident in New Zealand and that he performed the contract in New Zealand. It is however submitted that these factors are to be given little weight- ‘The proper place

of performance of a contract does not in any sense determine the proper system of law that is to apply to a contract as a matter of rule.’ (Rentokil p.434).” [sic]

Turning to my findings:

1. Is there an express selection of Victorian law to govern the employment contract?

In *Clifford v. Rentokil Ltd (NZ) [1995] 1 ERNZ 407,436* Judge Palmer notes the following observation from *Dicey and Morris (eleventh edition.)*

“When the parties had expressed their intention as to the law governing the contract, their expressed intention, in general, determined the proper law of the contract, at any rate if the application of foreign law was not contrary to public policy and the choice was ‘bona fide and legal.’”

The parties in this case recorded their agreements with each other in three separate stand-alone documents, each signed separately. These are headed, respectively:

- *Individual Employment Contract for Non-Award Employees*
- *Confidentiality Agreement*
- *Non-Disclosure Agreement*

As noted already, only the non-disclosure agreement contains a choice of law clause. There is nothing of the sort in either of the other two documents. I have no doubt that the choice of law clause applies to the non-disclosure agreement only. Mr Rooney’s arguments in support of an express choice of law are, with respect, essentially arguments that a choice of law can be inferred. They will be dealt with below. I am satisfied that the plain words of the written employment contract do not support the submission that there is an express selection of Victorian law as the proper governing law of the contract, or indeed of any other system of law.

I find that there is no express choice of any particular system of law.

2. Can an intention to select Victorian law as the proper law be inferred from the terms of the contract and the surrounding circumstances?

Mr Rooney has argued that the parties to a contract may be found to have made a real choice of law, although it is not expressly stated in the contract, where it is expressed or demonstrated with reasonable certainty. (Rome Convention, Article 3(1).) Amongst the factors to be considered when deciding whether such an inference can be drawn, Mr Rooney has relevantly and correctly included:

- the subsequent conduct of the parties;
- the nature and location of the subject matter of the contract;
- the residence of the parties;
- an express choice of law clause in a related transaction between the same parties;
- the legal terminology in the contract.

Considering these factors in relation to this case, I have concluded that factors supporting an inference that New Zealand law is the governing law, outweigh those supporting an inference that it is the law of Victoria.

First, while a number of clauses in the contract refer to provisions of Australian law, as we have seen above, the subsequent conduct of the parties has been to ignore most of these clauses. New Zealand public holiday, annual leave and sick leave entitlements have been substituted for the Australian equivalents, superannuation cover (as per clause 13) was not provided, and there is no evidence of the applicant ever getting the benefit of any provision of a Federal or State Award (per clause 18.) Nor is there any evidence that the respondent made any attempt to invoke the disputes procedures contained in clause 15. In his affidavit, Mr Timothy Horewood explained the fact that certain parts of the contract were not adhered to by saying that it would for instance have been impractical for the applicant to have been given Australian public holidays. New Zealand provisions were substituted to make it workable. On the same point, Mr Rooney argues as follows:

“the parties to a contract may incorporate some provisions of a foreign law as terms of the contract. Incorporation by reference is not the same as selection of a proper law. Accordingly, it is submitted that the fact Mr Moore’s leave entitlements were provided in accordance with the New Zealand Holidays Act 1981 does not detract from the reality that the governing law of the contract is that of the State of Victoria.”

Mr Watson says that it was never intended for the Australian components of the contract to apply to the applicant and they never were. He notes:

“Interestingly, if the respondent were successful in arguing that Mr Moore was employed by the Australian company, it would be admitting to a breach of that clause because it never offered these benefits to him.”

In relation to this argument, I would just say that the respondent cannot have it both ways. If, by consent, certain provisions have been effectively replaced by New Zealand entitlements, then the clauses that have been replaced no longer form part of the contract and cannot be relied upon as factors to support the inference of Victorian governing law. ‘Subsequent conduct’ has displaced express words or terminology in the contract, and supports the inference that New Zealand law is the governing law.

Next, the work to be performed under the contract was always to be performed in New Zealand, and the applicant was at all times resident in New Zealand. The applicant was employed by a company registered in New Zealand and trading as Musashi New Zealand, to work within that company’s New Zealand operations. There is no evidence of any suggestion that he might be called upon to work elsewhere. Again, this factor clearly favours an inference that New Zealand law was the governing law.

The only factor that supports an inference that the parties intended to choose Victorian law is the express choice of law clause in a related document, the non-disclosure agreement. I am satisfied that this is not enough by itself. The factors indicating the selection of New Zealand law outweigh those tending towards Australian law.

On balance, I am satisfied that it can be inferred that the parties intended that New Zealand law should govern this employment relationship.

3. With which system of law does the transaction have its closest and most real connection?

My finding above effectively disposes of the question of what was the proper law of the contract. However for the sake of completeness I record that I also accept that the employment agreement had its closest and most real connection with the New Zealand system of law. The line between the search for the inferred intention of the parties and the search for the system of law with which the

contract had its closest and most real connection has been described as fine and one which was frequently blurred. *Halsbury's* states at para 588:

“the law of the place of performance is likely to be regarded as the proper law, that is the system of law with which the contract is most closely connected, if the contract is made in one country but is wholly to be performed by both parties in another.”

I have already noted that the applicant was resident here, worked here, and was paid in N.Z. currency. The company itself also had a close connection here. The fact that Musashi Pty Ltd registered in New Zealand indicates that it had taken on a real connection to New Zealand. Although the New Zealand business operated as a division of the parent company (with three staff out of 49 employed here and reporting to management in Australia) it nonetheless did so with a degree of independence, operating its own bank account and paying tax here. Its position was no different to countless Australian organisations that do business in New Zealand, and routinely employ local people pursuant to local law. Any significance in the fact that Musashi Pty Ltd is also an Australian company is outweighed by the fact that it is an overseas company registered in New Zealand and trading as a New Zealand business, and the applicant knew that.

2. Does the Employment Relations Authority have jurisdiction to investigate Mr Moore's problem?

Mr Rooney submits that the Authority does not have jurisdiction to hear Mr Moore's claim. He argues that it would be illogical, impractical and unworkable for the Authority, acting in its investigative capacity, to apply Victorian law which is intended to be applied by courts in that state which adhere to a quite different set of rules and procedures. This submission has no force in the light of my finding that Victorian law does not apply to the agreement between the parties.

However, there is one other matter to be covered before I move on to consider whether the Employment Relations Authority is *forum non conveniens*. This is the effect of s.238 of the Employment Relations Act 2000.

Out of caution, and for the sake of completeness, I have taken care to show in this decision that the respondent's submission regarding the proper law to be applied to the contract would fail even on the three tests normally applied in a conflict of law setting. However, I consider it at least arguable (though it was not put to me) that this case can be determined by a simple reference to s.238 of the Employment Relations Act 2000. This section provides:

“No contracting out

The provisions of this Act have effect despite any provision to the contrary in any contract or agreement.”

The precursor of this provision, s 147 of the Employment Contracts Act 1991, was worded as follows:

“No contracting out-The provisions of this Act shall have effect notwithstanding any provision to the contrary in any contract or agreement”

I am satisfied that the change in wording does not change the effect of the provision.

The application of the Employment Contracts Act 1991 was discussed by the Court of Appeal in *Governor of Pitcairn and Associated Islands v Sutton* [1994] 2 ERNZ 426; [1995] 1 NZLR 426

(CA). That discussion can be read as a discussion of the application of New Zealand employment legislation. It includes the clear statement from Sir Ivor Richardson:

“While the Employment Contracts Act is broadly phrased, it is not expressed to apply extra-territorially or to override sovereign immunity.” [1994] 2 ERNZ 426 at p.506.

In *Clifford v. Rentokil Ltd (NZ) [1995] 1 ERNZ 407* Judge Palmer relied on the Court of Appeal decision in *Sutton* supra as authority for the principle that, notwithstanding its broadly phrased nature, the Employment Contracts Act 1991 was not an ‘overriding statute’ as that term is used in a conflict of laws setting. However he also noted what he described as the ‘fundamental caveat’ to the general situation in which the proper law of a contract will be indicated in one of the three ways set out above. The caveat was that:

“if, in a particular case, the parties to a particular employment contract which clearly, upon analysis, had in its material incidents the closest and most real connection with the employment law of New Zealand, had purported to expressly select as the proper law governing their contract of employment a foreign system of law which had little or no connection with that contract of employment, and thus comprising in substance a contracting out by the parties of the governing application of the Employment Contracts Act contrary to s. 147 of the Act, such a purported contracting out would, I hold, be void and of no effect. Certainly in such circumstances in a conflict of laws setting the proper law of contract could not be determined by such a process of selection.” p.433

Judge Palmer’s words indicate that although that Act was not an “overriding statute” s. 147 of the Employment Contracts Act nonetheless applied to prevent any purported contracting out that was contrary to the true nature of the transaction. I consider his words apply equally to s. 238 of the Employment Relations Act 2000, and consider that even if there had been an express choice of law, the case before me would be just such a case as he describes. In other words, I consider that s.238 prevents the parties from an express selection of a foreign system of law with little or no connection to the contract.

I am satisfied that Victorian law has little or no connection to this employment agreement. I accept rather that the Employment Relations Act 2000 applies to it, and following from that, I accept that the Employment Relations Authority has jurisdiction to determine a problem arising pursuant to that agreement.

3. Is the Employment Relations Authority ‘Forum non conveniens’?

Finally, the respondent argues that even if it were found that New Zealand law were the proper law of the contract, the appropriate forum for determination of the dispute is in any event, Victoria.

In *Beal v Jardine Risk Consultants [1999] 2 ERNZ 54* Judge Shaw summarised the factors relevant to a determination of the convenient forum as follows:

“In relation to the forum non conveniens argument, the principles agreed are as set out by Wallace J. in Oilseed Products (NZ) Ltd v H E Burton Ltd (1987) 1 PRNZ 313, 316, which in summary are:

- 1. A stay will only be granted where the Court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action*
- 2. The burden of proof rests on the defendant to persuade the Court to exercise its discretion to grant a stay.*

3. *The natural forum is that with which the action has the most real and substantial connection both in terms of convenience and expense and also **the law governing the relevant transaction.***”

(Bold print added by the Authority.)

Judge Shaw’s decision was subsequently considered by the Court of Appeal which accepted that the Employment Court judgement correctly identified the factors to be considered. It noted also that:

“It is increasingly being recognised that employment disputes should be resolved in the jurisdiction in which the work is carried out” Unreported, CA 208/99, decision of Gault J.

The material facts that have influenced my view on the earlier questions for determination, have similarly affected my determination on this final point. The respondent has not shown, on balance, that the Employment Relations Authority of New Zealand is not the appropriate forum for this matter. There is an inconvenience to respondent witnesses in travelling to New Zealand, but there would be an equal and counterbalancing inconvenience for the applicant in travelling to Australia. All other factors tend toward the case being heard here; the work was performed here, the governing law is that of New Zealand, and the contract has its closest connection to New Zealand.

I am satisfied that the Employment Relations Authority has jurisdiction to hear this problem according to New Zealand law, and is moreover the convenient forum to do so. The respondent’s protest to jurisdiction is dismissed.

Y S Oldfield
Member of Employment Relations Authority